Supreme Court, U.S.
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NO._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RONALD D. HARRIS,
Petitioner,

v.

AT&T COMMUNICATION, INC.
Respondent

Petition For Writ Of Certiorari To The United States Court of Appeals for The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court judgment denying reinstatement to an employee in a wrongful discharge case prohibits that employee from again seeking employment with the same employer in the future.

2. Whether *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 411 U.S. 792, 36 L.Ed.2d 688 (1973) requires an employee to prove, at the prima facie level, that he was more qualified than other job applicants, as well as their identity.

PARTIES TO THE PROCEEDINGS

In accordance with Rule 29.1 of the Rules of this Court, Petitioner states that there are no persons other than himself or his attorney, or to his knowledge, Respondent, with an interest in the outcome of this case. Petitioner is not aware of the parents, subsidiaries or affiliates of Respondent.

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No. _____

IN THE

Supreme Court of the United States

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RONALD D. HARRIS,
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v.

AT&T COMMUNICATION, INC.
Respondent

Petition For Writ Of Certiorari To The United States Court of Appeals for The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case:

OPINIONS BELOW

The court of appeals affirmed the district court's decision without an opinion (App.A-1a). The opinion of the district court (App.B-2a) is not reported in Federal Supplement.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 14, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 is codified in 42 U.S.C. Section 2000e. Section 703(a)(1) of Title VII makes it unlawful for an employer to

"fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin..." 42 U.S.C. Section 2000e-2(a)(1).

The remedies available under Title VII are listed in Section 706(g):

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."

STATEMENT OF THE CASE

Factual Background

This is an employment discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq.

Petitioner won a discrimination suit against the Respondent in August 1993 and on August 30, 1993 the trial

judge entered a final judgment in his favor. The trial judge denied Petitioner's request for reinstatement. In October 1993 Respondent placed advertisements in the Houston press seeking account executives for positions similar to the position Petitioner held while in the Respondent's employ. Petitioner mailed his resume to the Respondent and held phone conversations with Respondent's agents regarding employment. Petitioner was not hired and filed a subsequent action claiming wrongful failure to hire and unlawful retaliation.

The District Court's Decision

The district court granted Respondent's Motion for Summary Judgment holding that collateral estoppel barred Petitioner's second action against Respondent. Specifically, it held that the denial of reinstatement in the prior action barred Petition from seeking future employment with the Respondent.

The district court further held that Petitioner could not make a prima facie Title VII case for either unlawful retaliation or discrimination since, at the time the Motion for Summary Judgment was ruled upon, Petitioner did not present information regarding other applicants with Harris' qualifications.

The district court entered a final judgment against Petitioner on March 23, 1994. Petitioner timely appealed on April 22, 1994.

The Court of Appeals' Decision

The court of appeals affirmed the district court's ruling on August 14, 1995 without a written published opinion.

REASONS WRIT SHOULD BE GRANTED

Issue of First Impression

This case involves an issue of first impression for this Court, namely whether a court judgment denying reinstatement to an employee in a wrongful discharge case prohibits that employee from again seeking employment with the same employer in the future.

This is an issue of significant importance for a large segment of the society and for employees and employers alike. This Court has not addressed this issue in the past.

Circuit Split

There is currently a split in the circuits as to whether a court judgment denying reinstatement to an employee in a wrongful discharge case prohibits that employee from again seeking employment with the same employer in the future.

The Seventh Circuit Court of Appeals has held that a denial of reinstatement does not prevent an employee from seeking subsequent employment with the same employer. *Dhaliwal v. Woods Division, Hesston Corp.*, 930 F.2d 547 (7th Cir. 1991).

In affirming the decision of the district court, the Fifth Circuit Court of Appeals has held the contrary.

Conflict with Decision of this Court

The decision of the Fifth Circuit Court of Appeals that Petitioner may not seek employment with the Respondent conflicts with this Court's decision in *Franks v. Bowman Transportation Co.*, 96 S.Ct. 1264, 424 U.S. 763 (1978)

which distinguished between "reinstatement" and the "hiring of employees" within the employment context, since these two concepts apply to different factual contexts.

Additionally, the Fifth Circuit Court of Appeals' ruling that no prima facie Title VII case may be made unless Petitioner shows the identity of the other job applicants or that Petitioner was better qualified than the other job applicants further conflicts with this Court's decision in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 411 U.S. 792, 36 L.Ed.2d 688 (1973). The prima facie structure of *McDonnell Douglas* merely requires that the employee belong to a protected group; that he apply for employment and be qualified for the position for which he applied; that, in spite of his qualifications, he was not hired; and that, after the employee's rejection, the employer continued to seek applicants from among persons of the rejected employee's qualifications.

CONCLUSION

Petitioner moves the Court to grant his petition for a writ of certiorari. The issues at bar are of primary importance to a large segment of the country's population and work force. Additionally, the issue of "reinstatement" versus "failure to hire" in the context of a denial of reinstatement would be an issue of first impression for this court.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20327

RONALD D. HARRIS,
Plaintiff-Appellant,
versus
AT&T COMMUNICATIONS, INC.,
f/k/a AT&T Information Systems,
Defendant-Appellee.

Appeal from the United States District
Court for the Southern District of Texas
(CA H 92 3345)

Before JOLLY, DAVIS, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The judgment of the district court is AFFIRMED. See Local Rule 47.6.

AFFIRMED.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RONALD D. HARRIS, Plaintiff,	§	
v.	§	C.A. NO. H-92-3345
AT&T COMMUNICATION, INC., f/k/a/ AT&T COMMUNICATION SYSTEMS, INC., Defendant.	§	

MEMORANDUM OPINION

Pending before this Court is the Motion for Summary Judgment (Docket Entry #10) filed by Defendant A T & T Communications, Inc., f/k/a/ AT&T Information Systems, Inc. ("AT&T"). After considering this motion, the response (Dkt. #19) filed by Plaintiff Ronald B. Harris ("Harris"), the reply (Dkt. #21) filed by AT&T and the complete record filed in this action, this Court is of the opinion that AT&T's Motion for Summary Judgment and Request for Sanctions should be GRANTED to the extent described herein.

I.
BACKGROUND

Harris filed the present Title VII action on October 28, 1992, alleging discrimination on the part of AT&T. Specifically, Harris complains of AT&T's "systematic pattern of racial discrimination and retaliation" in violation of Title VII, 42 U.S.C. § 1981 and Article 5221k of the Texas Revised Civil Statutes.[1]

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[1] *See* Harris' Original Complaint (Dkt. #1).

According to Harris, the facts giving rise to his claims include events beginning in October 1991 when Harris responded to a newspaper advertisement placed by AT&T seeking applicants for a sales position.[2] Harris claims that he submitted his resume in response to this advertisement; however, he has never been contacted by AT&T concerning his interest in this position. Harris also claims that AT&T has acted with "intent and malice" in warning other employers to "stay away" from Harris.

On February 25, 1992, Harris filed a complaint with the Equal Employment Opportunity Commission ("EEOC") contending that AT&T had discriminated and retaliated against him by not considering him for the advertised sales position.[3] He received his right-to-sue letter from the EEOC on August 3, 1993, and filed the present action.

Although the foregoing synopsis adequately identifies the particular claims upon which Harris is now seeking relief, this scenario would not be complete without reference to a prior action involving these same parties. Harris had previously been employed by AT&T in a sales position as an account executive from approximately 1981 to 1987. In July 1988, Harris initiated a similar action, Cause No. H-88-2307, in which he alleged that AT&T discriminated and retaliated against him because of his race ("the prior action"). A detailed description of the facts giving rise to the prior action and the litigation itself is contained in the record

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[2] *See* Harris' Original Complaint (Dkt. #1) and Plaintiff's Response to AT&T's Motion for Summary Judgment and Request for Sanctions (Dkt. #19).

[3] Harris contends that AT&T discriminated against him because he is a "black male". He believes AT&T is retaliating against him for filing complaints with the EEOC and for prevailing in a prior discrimination lawsuit. *See* Original Complaint (Dkt. #1).

and need not be restated here; however, it is worth noting that Harris now appears to rely on these "background" events in the pleadings before this Court. At the conclusion of the prior action, a judgment was rendered by the district court which was later affirmed with slight modification by the Fifth Circuit Court of Appeals on January 27, 1993.

In considering the instant motion for summary judgment, this Court finds it extremely difficult to look beyond the fact that the district court in the prior action determined that Harris should *not* be reinstated to a position with AT&T due to the likelihood of continuing antagonism or hostility between Harris and AT&T.[4] The Fifth Circuit upheld that determination, and that decision is final.[5] Nevertheless, the present case comes before this Court as a result of Harris' efforts to obtain *another* sales position with AT&T within mere months after the conclusion of the prior action.

Undeniably upset with what it considers frivolous and harassing litigation, AT&T filed its Motion for Summary Judgment and Request for Sanctions on August 18, 1993. AT&T argues that summary judgment is appropriate because Harris has failed to meet his burden of proof on both his discrimination claim and his retaliation claim and that the doctrines of *res judicata* and/or collateral estoppel bar the present action. AT&T further claims that Harris has previously released AT&T from liability in this matter by

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[4] *See* Judge Hittner's Finding of Fact and Conclusions of Law in Cause No. H-88-2307 (the prior action), pp.9 and 15, Exhibit B to AT&T's Motion for Summary Judgment and Request for Sanctions (Dkt. #10).

[5] *See* Fifth Circuit Opinion in Appellate Cause No. 91-6065 (appeal from Cause No. H-88-2307), pp. 5-6 and 15-16, Exhibit C to At&T's Motion for Summary Judgment and Request for Sanctions (Dkt. #10).

entering into a Release of Judgment Lien and Release for Attorney's Fees in connection with the prior action.

Additionally, AT&T requests that the Court impose Rule 11 sanctions against Harris for bringing this action. AT&T argues that Harris' attempt to work again at AT&T and acts in filing this law suit constitute no more than an attempt "to circumvent the prior judgment" and have this Court enter a "different conclusion on the issue of reinstatement."[6]

II.
SUMMARY JUDGMENT STANDARD

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue

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[6] Defendant AT&T Reply to Plaintiff's Response to AT&T's Motion for Summary Judgment and Request for Sanctions, p.4 (Dkt. #21).

of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex*, 477 U.S. at 322. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. *Williams v. Weber Management Services*, 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *Anderson*, 477 U.S. at 254. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 2513. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings

and conclusions. *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987).

III.
ANALYSIS

A. *TITLE VII*

Title VII makes it an unlawful employment practice for an employer

> [t]o fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ...

42 U.S.C. § 2000e-2(a). Title VII also prohibits an employer from

> discriminat[ing] against any of his employees . . . because he opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). The United States Supreme Court has articulated clear principles for lower courts to follow in analyzing suits arising under Title VII. See *Saint Mary's Honor Center v. Hicks*, ___ U.S. at ___, ____, 113 S.Ct. 2742, 247 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of*

Community Affairs v. Burdine, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). These principles have been applied equally to refusal-to-hire cases. *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990); *Norris v. Hartmarx Specialty Stores, Inc.*, 913 F.2d 253, 254 (5th Cir. 1990).

Applying these principles to the present case and Harris' discrimination claim in particular, Harris must first establish, by a preponderance of the evidence, a *prima facie* case of discrimination, thus creating a presumption of discrimination. *See Burdine*, 450 U.S. at 254. Once such a presumption has been created, the burden shift to AT&T to "articulate some legitimate, nondiscriminatory reason" for the challenged action. *McDonnell Douglas*. 411 U.S. at 802. AT&T may satisfy this burden by presenting evidence which, " if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action". *Saint Mary's Honor Center v. Hicks*, ____ U.S. at _____, 113 S.Ct. at 2747. Once this burden is satisfied, the presumption raised by the Harris' *prima facie* case essentially evaporates, and Harris once again faces the ultimate burden of proving that AT&T intentionally discriminated against him. *Id.* Harris may accomplish this by establishing that AT&T's articulated reason is mere pretext for discrimination. *McDonnell Douglas*, 411 U. S. at 804-805.

Similarly, the evidentiary burdens in a retaliation context require that Harris establish a *prima facie* case of retaliation by a preponderance of the evidence and that AT&T respond by producing some legitimate, nondiscriminatory reason for the adverse employment action. *See McDaniel v. Temple I.S.D.*, 770 F.2d 1340 (5th Cir. 1985); *Jack v. Texaco Research Center*, 743 F.2d 1129 (5th Cir. 1984). Harris would then be responsible for proving

that AT&T's proffered reason is pretext for retaliation; however, the ultimate inquiry to be addressed in the retaliation context is whether or not retaliation for filing a charge under Title VII was a "but for" cause of the adverse employment decision. *McDaniel*, 770 F.2d at 1346. If Harris cannot establish this "but for" requirement, he may not prevail. *Id.*

To establish a *prima facie* case for discrimination, Harris must demonstrate (1) that he belongs to a racial minority; (2) that he applied and was qualified for the job for which AT&T was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open and AT&T continued to seek applicants from persons of Harris' qualifications. *McDonnell Douglas*, 411 U.S. at 802. To establish a *prima facie* case for retaliation, Harris must establish that (1) he engaged in an activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between his participation in the protected activity and the adverse employment action. *Barrow v. New Orleans, S.S. Ass'n.*, 10 F.3d 292 (5th Cir. 1994); *Shirley v. Chrysler First, Inc.*, 970 F.2d 39 (5th Cir. 1992).

As explained below, this Court is not convinced that Harris has successfully established a *prima facie* case of either discrimination or retaliation.

B. *DISCRIMINATION CLAIM*

In regard to his discrimination claim, Harris has only established that he belongs to a racial minority. Whether Harris actually applied for the available position offered by AT&T is disputed. Harris has consistently maintained that he complied with the information in the advertisement regarding applications and sent a resume to the appropriate

AT&T representative. AT&T strongly disputes this claim and has presented the affidavits of two AT&T representatives in support of its contention that Harris' resume was never received. AT&T therefore argues that Harris cannot establish that he applied for the job but was rejected and has thus has failed to demonstrate essential *prima facie* elements.

The fatal flaw in Harris' *prima facie* case of discrimination, however, is the complete absence of any information regarding other applicants with Harris' qualifications. AT&T has identified this missing element in its motion for summary judgment; however, in response, Harris merely states:

> ... the fact that at the time of his deposition, Harris did not personally know the names, race or qualifications of those hired for the advertised position does not mean that he would not be able to demonstrate that information at the time of trial.[7]

Clearly Harris cannot rely on evidence he *hopes* to obtain sometime prior to trial to create a presumption of discrimination now and survive AT&T's motion for summary judgment. It is incumbent on Harris to establish every required element of his *prima facie* case by a ***preponderance of the evidence***. Viewing the evidence as a whole, this Court finds that Harris has failed to provide a scintilla of evidence as to any other applicants considered by AT&T. Indeed, Harris has not even *alleged* that such applicants exist. Accordingly, AT&T is entitled to judgment as a matter of law on Harris' discrimination claim.

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[7] Plaintiff's Response to AT&T's Motion for Summary and Request for Sanctions (Dkt. 19), p. 4.

C. *RETALIATION CLAIM*

Likewise, summary judgment is appropriate on Harris' retaliation claim. Harris' former complaints of discriminatory conduct and retaliation are certainly actions protected by Title VII; Harris has thus satisfied the first prong of a *prima facie* case of retaliation. As mentioned above, however, a dispute exists as to whether Harris actually applied for the desired sales position and, assuming he did, whether AT&T ever received his resume. Harris has therefore failed to demonstrate the second element of his *prima facie* case: he cannot establish that an adverse employment action occurred. At best, Harris only offers his subjective belief that At&T did not consider him for the job because of his previous complaints. Subjective beliefs are simply insufficient to provide *prima facie* proof of an alleged Title VII violation and cannot of themselves create a genuine issue of fact. *See Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985).

In addition, Harris has produced insufficient evidence that his protected actions caused AT&T to reject his application (assuming it was actually sent and received). AT&T has articulated several seemingly legitimate, nondiscriminatory reasons why Harris would not have been considered for the sales position, not the least of which is the fact that both the prior trial court and the Fifth Circuit ordered that Harris not be reinstated to his former position at AT&T. Obviously, this reason is not only causally related, but directly results from the prior action and the events that prompted the filing of that action.[8] This causal relationship,

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[8] The district court in the prior action found that "there exists a likelihood of continuing antagonism or hostility between Harris and At&T", Findings of Fact and Conclusions of Law in Cause No. H-88-2307, p.15, Exhibit B to AT&T's Motion for Summary Judgment and

however, does not support any inference that AT&T *unlawfully* refused to, in essence, *re*-hire Harris. Harris has not presented any independent evidence that would enable a fact finder to conclude that At&T's refusal to hire him was impermissibly related to Harris' prior complaints. In sum, Harris' assertions of reprisal are not supported by the evidence and are therefore insufficient to successfully oppose a motion for summary judgment.

Harris has failed to establish a *prima facie* case of either discrimination or retaliation. AT&T is therefore entitled to judgment as a matter of law on Harris' Title VII claims.

D. *COLLATERAL ESTOPPEL*

Assuming, *arguendo*, that Harris has successfully met his burden of proof on his discrimination and retaliation claims, the Court finds that the doctrine of collateral estoppel bars not only his Title VII claims, but *all* of Harris' claims. Although AT&T argues that the doctrine of *res judicata* encompasses the claims at issue, this Court finds more persuasive AT&T's collateral estoppel argument.

Generally, courts apply the term "*res judicata*" in reference to claim preclusion, which describes the effect of a prior judgment on all legal theories and claims that were never litigated but should have been advanced in connection with a particular cause of action. *Hogue v. Royse City*, 939 F.2d 1249, 1252 n.2 (5th Cir. 1991). In contrast, "collateral estoppel" is frequently characterized as issue preclusion because it bars relitigation of issues actually litigated and essential to the judgment in a prior suit, regardless of

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Request for Sanctions. (Dkt. #10).

whether the second suit is based on the same cause of action. *Stevenson v. International Paper Company*, 516 F.2d 103, 109-110 (5th Cir. 1975).

As Harris correctly points out, the prior action was premised on issues of whether AT&T had impermissibly discriminated against Harris while he was employed by AT&T between mid-1986 and 1987. The present case focuses on events that took place four years later in October 1991. In this action, Harris does appear to be relying to some extent on circumstances made the subject of the prior action as "background" facts to establish AT&T's alleged discriminatory animus; however, this Court does not find that two suits arise out of the same set of facts. Harris' claim that AT&T refused to consider him for a sales position in October 1991 could not have been advanced in support of the causes of action previously adjudicated in the prior trial in August 1991. The Court is not persuaded that the present action can be cast as merely a successive action to remedy the *same* wrongs as were previously litigated. The doctrine of *res judicata* is therefore not applicable.

The doctrine of collateral estoppel is applicable. To invoke the doctrine of collateral estoppel, AT&T must establish that (1) the issue to be concluded is identical to that involved in the prior action; (2) in the prior action, the issue was actually litigated; and (3) the determination made of the issue in the prior action was necessary and essential to the resulting judgment. *International Association of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125, 132 (5th Cir. 1975). *See Stevenson*, 516 F.2d at 110. AT&T has established these three criteria.

Certainly, the first criterion is satisfied. The district court in the prior action was called upon to fashion an appropriate remedy for the Title VII violations alleged and

established in that litigation, and, in doing so, expressly considered reinstatement.[9] In essence, the issue to be litigated in the action currently pending before this Court is whether Harris should again work for AT&T. That issue was determined in the prior action when the district court made an express finding that Harris should not be reinstated because of the potential for *future* hostility between Harris and AT&T.[10] Harris appealed that determination, and the Fifth Circuit upheld the district court's finding. Thus the issue of Harris' employment status with AT&T was fully and fairly litigated in the prior action and was essential to the final judgment. Accordingly, the second and third elements required to invoke the doctrine of collateral estoppel are also present, and this subsequent action seeking employment with AT&T is barred by operation of the doctrine of collateral estoppel.

D. *RELEASE AGREEMENT*

After the district court ruled that Harris recover judgment in the prior action, AT&T entered into a release agreement whereby Harris released AT&T from "all liens, claims and demands heretofore existing by reason of such [the prior] action".[11] AT&T argues that this release agreement alone precludes the present lawsuit because it directly incorporates the final judgment entered in the prior

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[9] *See* Judge Hittner's Findings of Fact and Conclusions of Law in Cause No. H-88-2307 (the prior action), pp. 9 and 15, Exhibit B to AT&T's Motion for Summary Judgment and Request for Sanctions (Dkt. #10).

[10] *See id.*

[11] *See* Release of Judgment Lien and Release of Lien for Attorneys Fees, Exhibit I to AT&T's Motion for Summary Judgment and Request for Sanctions (Dkt. #10).

action which addressed the issue of reinstatement. Although AT&T's argument is well taken, this Court is not prepared to go so far as to determine that the release agreement, standing alone, operates as a bar to the present suit; however, it is not necessary to fully address this issue as other grounds exist mandating judgment in AT&T's favor.

E. *SANCTIONS*

As mentioned previously, AT&T has presented forceful arguments for the imposition of sanctions against Harris. Specifically, AT&T requests that this Court not only assess sanctions against Harris and/or his attorney, but also enter an injunction prohibiting Harris from again seeking employment with AT&T. AT&T further urges "the striking of [Harris'] pleadings, the award of a default judgment in favor of AT&T, and an award to AT&T of the attorneys' fees it has incurred in this action."[12] This request is based on AT&T's firm belief that Harris filed the current action for the improper purpose of attempting to have another court reach a different conclusion of the issue of reinstatement.

This Court strongly agrees that Title VII must not be allowed to become a license for the filing of endless lawsuits by disgruntled former employees. Such an abuse of the legal system results in a waste of judicial and litigants' resources and cannot be tolerated. The imposition of Rule 11 sanctions is often necessary to deter this undesirable behavior.

As was noted above, both the district court in the prior action and the Fifth Circuit made it clear to Harris that he should not work again for AT&T. Harris clearly

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[12] Defendant AT&T's Reply to Plaintiff's Response to AT&T's Motion for Summary Judgment and Request for Sanctions, p. 5 (Dkt. #21).

disregarded this message. Furthermore, it is obvious that AT&T has expended considerable time and resources in defending the present action because of Harris' and\or his attorney's questionable judgment.

In determining whether sanctions should be imposed, this Court must consider reasonableness in tandem with the goals of Rule 11, including deterrence, punishment, and compensation. *See Estiverne v. Sak's Fifth Avenue*, 9 F.3d 1171, 1174 (5th Cir. 1993); *Thomas v. Capital Secur. Services, Inc.*, 836 F.2d 866, 879 (5th Cir. 1988). An award of fees should only be made where "a claim or motion is patently unmeritorious or frivolous," and lesser sanctions are inadequate to "deter the undesirable behavior." *Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 194 (3rd Cir. 1988).

A review of the entire record reveals that the attorney-client relationship between Harris and his attorney has been plagued with problems that ultimately led to a motion to withdraw filed by counsel. This motion was filed after the submission date for AT&T's motion for summary judgment, and no response to the motion for summary judgment had yet been filed. The Court therefore requested that Harris' attorney respond to AT&T's motion for summary judgment before leave would be granted to withdraw. Counsel for Harris filed a response. This Court is therefore reluctant to find that counsel violated Rule 11 in further advocating his client's position, although the Court does question counsel's judgment in initially filing this action. Furthermore, in considering the imposition of fees against Harris, this Court must consider equitable factors and consider the relative wealth of the parties and the sanctioned party's ability to pay. In light of the foregoing, the Court will not impose an award of fees; however, Harris shall pay the reasonable costs incurred by AT&T in defending this

action. Obviously, in light of the Court's disposition of AT&T's motion for summary judgment, it is not necessary to consider the other relief AT&T has requested.

Harris should not be *well* aware that based on the record filed both in the prior action and this action, courts will not tolerate any further attempts on his part to maneuver the legal system to obtain employment with AT&T. Such attempts will surely be met with harsh consequences.

IV.

CONCLUSION

For the reasons explained above, this Court hereby

ORDERS that AT&T's Motion for Summary Judgment and Request for Sanctions is GRANTED to the extent that judgment in favor of AT&T shall be entered on all claims asserted by Harris in the above styled and captioned cause of action and Harris shall pay all reasonable costs of Court incurred by the parties in this action.

The Clerk will enter this Order and provide all parties with a true copy.

Signed this 21st day of March, 1994.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RONALD D. HARRIS,	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL
	§	ACTION NO.
AT&T COMMUNICATION, INC.,	§	H--92-3345
f/k/a AT&T COMMUNICATION	§	
SYSTEMS,INC.,	§	
Defendant.	§	

FINAL JUDGMENT

Based on the Memorandum Opinion entered of even date herewith, granting summary judgment in favor of Defendant AT&T Communication, Inc., f/k/a AT&T Communication Systems, Inc. ("AT&T"), this Court finds that entry of a final judgment in the above styled and captioned cause is appropriate. It is therefore

ORDERED, ADJUDGED and DECREED that Plaintiff Ronald D. Harris ("Harris") take nothing by way of his claims in this action against AT&T. It is further

ORDERED that Harris shall pay all reasonable costs of Court incurred by the parties.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a true copy to all parties.

Signed this 21st day of March, 1994.

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 13 1995
OFFICE OF THE CLERK

(2)

No. 95-757

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RONALD D. HARRIS,
Petitioner,
v.
AT&T COMMUNICATION, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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December 13, 1995

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STATEMENT REQUIRED BY RULE 29.1

1. Respondent AT&T Corp. owns an equity interest in the following publicly traded companies:

Compagnie Industriali Riunite, S.p.A. (Italy); and
AT&T Capital Corporation.

AT&T owns an equity interest in the following non-publicly traded companies, which have public debt outstanding:

AT&T Credit Corporation;
AT&T Global Information Solutions Company (formerly NCR Corporation); and
McCaw Cellular Communications, Inc.

TABLE OF AUTHORITIES

CASES

	Page
Dhaliwal v. *Woods Div., Hesston Corp.*, 930 F.2d 547 (7th Cir.), *cert. denied*, 502 U.S. 867 (1991)	4
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973)	2

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RESPONDENT'S BRIEF IN OPPOSITION

This case does not raise the questions or the conflict the petition purports to present. Instead, in an unpublished per curiam decision, the Fifth Circuit simply affirmed a district court's routine application of well-settled legal principles to a unique set of facts.

1. Petitioner was employed by respondent in a sales position from 1981 to 1987. Pet. App. 3a. In 1988, he initiated the first of two employment discrimination suits against respondent (the "initial action"). In August 1991, petitioner obtained a judgment in the initial action that respondent had discriminated against him because of his race. The district court concluded, however, that petitioner should not be reinstated to a sales position with respondent, a judgment the Fifth Circuit affirmed. Pet. App. 4a.

In the lawsuit that gives rise to this petition, petitioner alleges that in October 1991, he saw a newspaper advertisement in which respondent sought applicants for a sales position. Pet. App. 3a. Although, just one month earlier, the district court in the initial action had held that petitioner should not be reinstated to a sales position with respondent, petitioner claims that he nevertheless applied for the position. Respondent never received an application from petitioner, however, and therefore never responded to his application. Pet. App. 9a-11a. Petitioner alleges that respondent's failure to hire him was the result of unlawful discrimination and retaliation.

Following discovery, the district court granted summary judgment in favor of respondent. Applying the standards announced in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the court found that petitioner had made only one of the four showings necessary to a *prima facie* claim of discrimination—*i.e.*, that he belongs to a racial minority. Pet. App. 9a. With respect to the other elements of his *prima facie* case, the court found that, because petitioner could not rebut respondent's showing that it never received an application from him, petitioner could not show either that he had applied and was qualified for the position, or that he had been rejected. Pet. App. 10a. The court also found that, even if petitioner could have shown that he had been "rejected," he had completely failed to show that thereafter respondent continued to seek applicants with his qualifications. The court explained that petitioner "failed to provide a scintilla of evidence as to any other applicants considered" and indeed, had "not even *alleged* that such applicants exist." *Id.* (emphasis in original).

The district court likewise entered judgment for respondent on petitioner's retaliation claims. The court held that petitioner's failure to show that respondent received his application precluded a showing that he had suffered any "adverse employment action." Pet. App. 11a. In addition, the court found that petitioner had

"not presented any independent evidence that would enable a fact finder to conclude that [respondent's] refusal to hire him was impermissibly related to [petitioner's] prior complaints" of discrimination. Pet. App. 12a. The court noted that respondent had articulated a number of legitimate, nondiscriminatory reasons for not hiring petitioner. Pet. App. 11a.

As an alternative basis for its decision, the court held that petitioner's claims were barred by principles of collateral estoppel. The court held that, in essence, the issue petitioner sought to litigate was whether he should be reinstated to his prior position with respondent. Pet. App. 13a-14a. Because that issue had been fully and fairly litigated and finally determined in the initial action, petitioner was barred from relitigating it. Pet. App. 14a.

The Fifth Circuit affirmed without opinion, citing its rule that cases "that have no precedential value and merely decide particular cases on the basis of well-settled principles of law" do not warrant written dispositions. Pet. App. 1a.

2. The decisions below raise no issue worthy of this Court's attention. Contrary to petitioner's claims, the lower courts did not hold that, to make out a *prima facie* claim, a Title VII plaintiff must "show[] the identity of the other job applicants or that [the plaintiff] was *better* qualified" than other applicants. Pet. 5 (emphasis added). Rather, the district court simply required petitioner to show that "after his rejection, the position remained open and [respondent] continued to seek applica[tions] from persons *of* [*petitioner's*] qualifications." Pet. App. 9a (emphasis added) (citing *McDonnell Douglas*, 411 U.S. at 802). Petitioner unquestionably failed to make this required showing.

Nor did the courts below hold that a successful Title VII plaintiff may never seek future employment with a defendant employer when reinstatement is denied. First,

as petitioner himself acknowledges, the district court's principal and independently dispositive holding was "that Petitioner could not make a *prima facie* Title VII case for either unlawful retaliation or discrimination since . . . Petitioner did not present information regarding other applicants with [his] qualifications." Pet. 3. Plainly, a plaintiff who cannot establish that he applied or was as qualified as those considered for a position cannot claim that his failure to be hired was the result of unlawful animus. Because these findings by the district court are wholly dispositive, no broader questions concerning rights of reinstatement are even implicated by the case.

Second, even the district court's alternative holding does not announce any general rules concerning reinstatement. Rather, the district court made the altogether unremarkable factual determination that, because petitioner sought the same position he had previously held with respondent only one month after a different court had denied his request for reinstatement, his claims were "[i]n essence" the same as those he had previously litigated with respondent. Pet. App. 14a. This factual ruling, based on the unusual circumstances of this case, is correct, and does not raise any questions requiring this Court's review.

Finally, the rulings below do not conflict with the decisions of any other court. The only case petitioner cites, *Dhaliwal* v. *Woods Division, Hesston Corp.*, 930 F.2d 547 (7th Cir.), *cert. denied*, 502 U.S. 867 (1991), did not involve rights of reinstatement under Title VII, but rather the interpretation of a private contract. *Id.* at 547-48. The Seventh Circuit's contractual analysis, moreover, is completely consistent with the decisions below: the court recognized that a person who applies for a prior position shortly after settling a discrimination suit may be found to be "seeking reinstatement" and thus may be barred from doing so by a settlement agreement precluding such relief. *Id.*

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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December 13, 1995

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